No. 96-883

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Supreme Court of the United States

OCTOBER TERM, 1996

SANDRA PARKER, Individually and as the Next Friend of DANA M. PARKER, and DANA M. PARKER,

Petitioners,

vs.

RODNEY BOYER, DAN DELL, SIMON RISK, and MULTI-MEDIA KSDK, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENTS RODNEY BOYER, DAN DELL, AND SIMON RISK

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Rodney Boyer, Dan Dell, and Simon Risk respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 93 F.3d 445.

STATEMENT OF THE CASE

Plaintiff-Petitioners Sandra Parker, individually and as next friend of Dana M. Parker, and Dana M. Parker filed this action pursuant to 42 U.S.C. §1983 and Missouri law. The Parkers asserted federal and state law claims against numerous defendants in connection with the entry of the media into the Parkers' residence where police officers were executing a valid search warrant. Among other things, the Parkers alleged that Defendant-Respondent St. Louis City police officers Rodney Boyer, Dan Dell, and Simon Risk violated the Parkers' federal constitutional rights under the Fourth Amendment. The Parkers also asserted constitutional claims against Defendant-Respondent Multi-Media KSDK, Inc. (KSDK).

In their petition for writ of certiorari, Petitioners refer to a number of "facts," without referring to authority for them, which were neither undisputed on the summary judgment record nor found to be true in any proceeding below. The limited undisputed evidence on the summary judgment record, as recounted in the district court and Eighth Circuit opinions, showed in part the following. On February 9, 1994, at or around 6:00 p.m., Respondents Boyer and Dell were instructed at their roll call that they would be accompanied in their patrol car that evening by two employees of KSDK. During the course of their patrol, officers Boyer and Dell were presented with the opportunity to execute a valid search warrant which Boyer previously had obtained in order to search for controlled substances and firearms at the private residence located at 5242 Maple in St. Louis,

Missouri. At approximately 9:00 p.m., officers Boyer and Dell notified other members of the St. Louis City Police Department's Mobile Reserve Unit of the impending search, and other officers then responded at an agreed upon location near the Maple address.

Approximately seven responding officers—including Boyer, Risk, and Dell—proceeded to 5242 Maple to execute the search warrant. The resident individual targeted for possession of the items listed in the search warrant, Travis Martin, was detained by officers outside the residence. The officers made an unforced entry into the residence through the unlocked front door. In a search of the residence, officers recovered a .380 caliber pistol, a Cobray M-11 9 mm. assault pistol, and bags of a substance believed to be cocaine.

KSDK employees entered the residence behind the police, and took film footage and interviewed some of the police officers and some of the occupants of the residence. At some point during the course of the search, a Lieutenant arrived to supervise the scene. The detained suspect, Travis Martin, was arrested for controlled substance and firearm offenses.

At no time, either before, during or after the search, did any defendant police officer advise or give permission to KSDK personnel to enter the premises, take film footage or interview any occupant of 5242 Maple. Nor did any employee of KSDK request permission from any defendant police officer to enter the premises, take film footage or interview any occupant of 5242 Maple. Further, at no time did any occupant of the house ask any defendant police officer to prevent or stop KSDK from entering the premises, to have KSDK leave the premises, or to prevent KSDK from filming or interviewing. No other details appear on the record regarding the role of Respondents Risk, Boyer, or Dell with respect to the media. (Petitioner's App. 2a-4a, 17a-20a.)

Based on the foregoing, the district court entered its order granting partial summary judgment in favor of the Parkers and against Respondents Boyer, Dell and Risk, on the Parkers' Fourth Amendment claim. The district court granted summary judgment in favor of certain other defendants, including Respondent KSDK. The district court subsequently issued an amended judgment clarifying that it had rejected Boyer, Dell, and Risk's qualified immunity defense. (App. 15a, 30a.)

On interlocutory appeal, the Eighth Circuit Court of Appeals reversed the finding of liability against officers Boyer, Dell, and Risk and held the officers protected by qualified immunity for their limited roles in allowing KSDK to enter the premises and film portions of the search. The Eighth Circuit also upheld the district court's ruling that KSDK had not acted under color of state law, as it was undisputed that KSDK acted independently in deciding to enter the house and film and that neither KSDK nor the police assisted the other in their respective tasks. (App. 4a-6a.) The Court of Appeals then denied Petitioners' request for a rehearing en banc. (App. 10a.)

Petitioners now request that this Court grant certiorari, asserting, among other arguments, that the Eighth Circuit decision conflicts with *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), *cert. denied*, 115 S.Ct. 1689 (1995), and that the Eighth Circuit's qualified immunity analysis is otherwise flawed.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Claimed Conflict With The Second Circuit Does Not Justify Granting A Writ of Certiorari.

Contrary to Petitioners' argument, the decision below does not conflict with *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), *cert. denied*, 115 S.Ct. 1689 (1995), nor did *Ayeni* present a scenario identical to the one now before the Court. Further, even to the extent that this Court might conclude the decision below is inconsistent with *Ayeni*, such an inconsistency does not justify granting a writ of certiorari.

In *Ayeni*, the Second Circuit was presented with a factual scenario in which a secret service agent "invited" a CBS news crew into a home while conducting a search, the occupant of the home verbally objected to the videotaping of herself and her son and tried to hold a magazine to shield her and her son's faces, and the secret service agent responded by "grab[bing] the magazine out of [the plaintiff's] hand, thr[owing] it on the floor, and [telling] the plaintiffs to `shut up.'" 35 F.3d at 683. Agents then "*directed* the camera crew to videotape Mrs. Ayeni's face." *Id.* The *Ayeni* court held that the agent was not entitled to qualified immunity as his actions violated well-established general Fourth Amendment principles, even though the court could not point to any pre-existing case law or published text addressing the contours of the Fourth Amendment right at issue. *Id.* at 686.

In the decision below, the Eighth Circuit noted the existence of *Ayeni* but did not criticize the case or characterize it as in conflict with its own decision. While declining to conclude that the broad activity of "allowing" media entry into a home during a search violated self-evident Fourth Amendment principles, the Eighth Circuit held simply in the fact-specific context before it, "we cannot say that the kind of conduct in which police engaged in this case was a violation of a clearly established constitutional

principle of which the police, at the time they executed their search warrant, should have been aware." (App. 5a.)

Thus, while *Ayeni* and the present case both pertain to the presence of media during a search of a home, they present different factual scenarios—*Ayeni* a much more egregious one—and accordingly different results as to whether the particular defendants involved were protected by qualified immunity. Moreover, even if the results of the two cases can be said to be inconsistent, it is not an inconsistency warranting resolution by this Court. The specific contexts of the cases are not likely to recur, and there is plenty of room for development of precedent at the court of appeals level to further define the contours of the Fourth Amendment right at issue.

II. The Petition Should Be Denied Because The Eighth Circuit Correctly Decided Based On The Factual Circumstances Of This Case that Respondents Boyer, Dell, and Risk Are Protected By Qualified Immunity.

Admittedly, the Eighth Circuit chose not to engage in a protracted discussion of the contours of the Fourth Amendment right arguably at issue in this case, as the court concluded that the individual Respondent officers in any event would be protected by qualified immunity. This method of analysis, does not, however, warrant the grant of a writ of certiorari.

If this Court grants Petitioners' request for a writ of certiorari in this interlocutory appeal, a main issue before the Court will be whether the Respondent police officers were protected by qualified immunity for their alleged actions. In such an inquiry, it is important that the conduct is analyzed in its particularized context, and the question is whether the "contours of the right" allegedly violated were sufficiently clear when the official acted so that his conduct violated a clearly established statutory or constitutional right of which he should have known. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Mitchell v. Forsyth*,

472 U.S. 511, 530 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

Based on the little or no interaction that Respondent officers had with the media in this case, and based on the dearth of case law relevant to the officers' conduct published at the time of their conduct in February 1994, the Eighth Circuit correctly decided that, even if Petitioners' Fourth Amendment rights were implicated, the Respondent officers were protected by qualified immunity. Thus, the respective rights and liabilities of the parties would not be changed by the grant of a writ of certiorari. Further, based on the factual record, this case simply does not present a scenario which, if analyzed more deeply in the context of the Fourth Amendment, would lead to a definition of the contours and boundaries of the Fourth Amendment right arguably at issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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